

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LISA WHITMORE, Individually, and as
Administratrix of the Estate of
THEODORE WHITMORE, Deceased,

Plaintiff,

-against-

KEVIN M. KERBIS, DENNIS KERBIS,
KEITH B. SMITH, HELENA CHEMICAL
CO., and WHEELS, INC.,

Defendants.
-----X

KEITH SMITH and REBECCA SMITH,

Plaintiffs,

-against-

LISA WHITMORE, as Administratrix of the
Estate of THEODORE WHITMORE, deceased,
and KEVIN M. KERBIS and DENNIS KERBIS,
PENSKE TRUCK LEASING,

Defendants.
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Index No. CV-05-3895 (DGT)

**NOTICE OF MOTION FOR
CERTIFICATION PURSUANT
TO 28 U.S.C. § 1292(b)**

Motion denied. Section 1292(b) certification is
inappropriate where the issue is the existence or
non-existence of a material fact. That is not a
"controlling question of law." See Harriscom
Svenska AB v. Harris Corp., 947 F.2d 627, 631
(2d Cir. 1991); Gilbert v. Seton Hall University,
No. 94 CV 1534, 2001 WL 1602167 (E.D.N.Y. 2001);
Monaghan v. SZS 33 Associates, L.P., 153 F.R.D.
60 (S.D.N.Y. 1994).

SO ORDERED.

S/Brian M. Cogan
U.S.D.J.

PLEASE TAKE NOTICE, that, on a date and time to be designated by the Court,
Defendants Keith B. Smith, Helena Chemical Co., and Wheels, Inc. (collectively "Smith"), by
and through its undersigned attorneys, Seiden Wayne LLC, will move before The Honorable
Brian M. Cogan, U.S.D.J., of the United States District Court for the Eastern District of New
York for an Order granting Smith's Motion for Certification Pursuant to 28 U.S.C. § 1292(b) of
the Court's Order dated April 17, 2007 denying Smith's Motion for Summary Judgment.

PLEASE TAKE FURTHER NOTICE that in support of this Motion, Defendant will rely upon its Memorandum of Law and the Certification of Robyn M. Gnudi, Esq. together with Exhibits A through F submitted herewith.

PLEASE TAKE FURTHER NOTICE that Oral Argument is requested.

PLEASE TAKE FURTHER NOTICE that a proposed Form of Order is also being submitted together with this Notice of Motion.

SEIDEN WAYNE LLC

Attorney for Defendants Keith B. Smith,
Helena Chemical Co. and Wheels, Inc.

By:

/s/
Robyn M. Gnudi (RMG-4316)
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Dated: May 11, 2007

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